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No. 88-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, FRVR CORPORATION, and the INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This reply brief is respectfully submitted by petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] and the fourteen (14) individual labor organizations in response to the joint brief by respondents Chicago & North Western Transportation Company [hereinafter, "C&NW"] and FRVR Corporation in opposition to this petition, and in response to statements made by the United States as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*, concerning the issues raised by this case.

I. Contrary To Respondents' Assertions, The Status Quo Question Presented By This Case Is Not Settled, But Rather Involves An Issue Which The United States, As An *Amicus Curiae* In No. 87-1888, Has Argued Warrants Review By This Court

Respondents and the lower courts in this case have viewed the issue presented by rail labor's claim that the Railway Labor Act's status quo obligation prohibited the C&NW from selling the Duck Creek South lines until after it had bargained, as presenting a major-minor dispute classification issue. Respondents continue to press that classification assertion before this Court. Indeed, they do so even though they have also conceded in their brief in opposition to this petition that rail labor has served Section 6 notices to bargain for agreements to deal with the impact of the proposed sale on employees and that the "only question" addressed by the Seventh Circuit concerned "the scope of the 'status quo' pending bargaining, given C&NW's claim that the force-reduction provisions in existing agreements authorize" the job abolishments. Resp. Brief at 24. Contrary to respondents' assertions, the application of the major-minor dispute classification standard to disputes over what working conditions must be preserved as part of the "actual, objective working conditions," is not accepted by all of the circuits which have addressed this issue, and indeed, as petitioners have submitted, is in conflict with the decision of this Court in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969). Moreover, respondents' arguments as to the scope of the Act's status quo obligation present the very issue which the United States, as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*, asserted "may have far-reaching consequences for labor-management relations in the railroad and airline industry [*sic*] and warrants this Court's review." U.S. Brief in Nos. 87-1589 and 87-1888 at 17.

What respondents have done throughout this litigation is to rely upon the exclusive jurisdiction of adjustment boards over the resolution of minor disputes to assert that federal courts do not have jurisdiction to resolve the merits of C&NW's claim that it has a contractual right to take certain actions either before or during the status quo period. By using this approach, respondents have been successful in having the lower courts classify as a "minor dispute," not only rail labor's claim that the C&NW had an obligation under Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, to serve its own notice under Section 6 of the Act, 45 U.S.C. § 156, but also rail labor's alternative assertion that the Act's status quo obligation, which was triggered once rail labor served their own Section 6 notices, precluded the sale. Those two contentions by rail labor, however, are independent of each other, and raise distinct issues which respondents have collapsed into one.

Rail labor's first argument in support of its unsuccessful injunctive request, was that the proposed sale would change existing working conditions as embodied in agreements, and, thus, the C&NW was required by Section 2 Seventh of the Act to give notice under Section 6 and to bargain for an agreement. That notice, of course, would trigger the Act's status quo obligation which, in turn, would have required the C&NW to "preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo*, 396 U.S. at 153. It is usually in connection with a carrier's assertion that the dispute does not involve a change in working conditions that the major-minor classification standard has been applied. *E.g.*, *UTU v. Burlington Northern, Inc.*, 458 F.2d 354, 356 (8th Cir. 1972).

However, rail labor's second argument below raised different issues, for petitioners argued that once they served their own Section 6 notices, those notices triggered the Act's status quo requirement which then froze the existing working conditions. That question raises issues as to both the scope of the status quo and the identity of the forum which is to resolve disputes over that scope. Contrary to respondents' assertions, those issues, including whether the major-minor classification standard even applies, are not settled. *Compare, UTU v. Illinois Terminal R.R.*, 471 F.2d 375 (7th Cir. 1972), *with, Rutland Ry. v. BLE*, 307 F.2d 21 (2d Cir. 1962), *cert denied*, 372 U.S. 954 (1963).

For example, in the recently issued printed slip opinion in *ALPA v. Eastern Air Lines, Inc.*, D.C. Cir. Nos. 88-7201, 88-7202 and 88-7203, decided September 30, 1988 (printed slip op. issued October 28, 1988), the United States Court of Appeals for the District of Columbia Circuit asserted that there was a conflict among the circuits as to whether the filing of a Section 6 notice and the expiration of the ~~status quo~~ contract period made any dispute automatically major (Slip op. at 14), and it refused to adopt what it believed was the erroneous view of the Ninth and Second Circuits. *Id.* at 14-19. While petitioners submit that the District of Columbia Circuit misconstrued the import of the decisions on which it relied, the point remains that the circuits are not uniform on whether a dispute over what constitutes the status quo once a Section 6 notice has been served, can convert a major dispute into a minor dispute. In other words, the circuits are not in agreement as to whether the federal courts or the adjustment boards have jurisdiction to determine what "actual, objective working conditions" must be preserved during the Act's status quo period. *Compare, Air Cargo, Inc. v. Local 851, IBT*, 733 F.2d 241 (2d Cir. 1984).

That issue is presented by the first question posed by this petition and will require this Court to examine the scope of the status quo as expressed in *Detroit & Toledo*. This is so, petitioners submit, for respondents and the United States are asserting that the status quo obligation "does not prevent the carrier from taking actions that are authorized under the existing collective bargaining agreements." U.S. Brief at 15. Moreover, respondents and the United States go further and assert that the carrier may implement a disputed interpretation of its contractual rights during the status quo period. Resp. Brief at 18-19; U.S. Brief at 15 n.12. That argument, however, is contrary to this Court's holding in *Detroit & Toledo* that the status quo, which the Act requires be maintained, extends past the collective bargaining agreements, whether written or implied, and covers those "actual, objective working conditions and practices, *broadly conceived* . . . ." 396 U.S. at 153 (emphasis added). Indeed, respondents' and the United States' arguments are, in essence, a more restrictive variation of the position advanced by Justice Harlan in his dissent to *Detroit & Toledo* that the approach to determine the Act's status quo obligation should be a "subjective" one which examines "whether in the context of the relationship between the principals, taken as a whole, there is a basis for implying an understanding on the particular practice involved" (396 U.S. at 160 (Harlan, J., concurring and dissenting)), rather than the objective one adopted by this Court.

If, as petitioners assert, their view of the status quo is the correct rule of law, then the status quo obligation requires a carrier to maintain unchanged those actual, objective working conditions as they have been applied and interpreted prior to the service of the Section 6 notice. Thus, it logically follows that it is the federal courts, and not the adjustment boards, which are to determine what working conditions actually constitute the

status quo, for previously unasserted contractual rights are not part of the status quo. These issues as to scope and jurisdiction are obviously important to the rail and airline industries, and as the United States asserts with respect to the scope question, warrant review by this Court.

II. Respondents' Brief Shows The Urgent Need For This Court To Clarify The Proper Role Of Federal Courts In Rail Labor Disputes

Ignoring totally rail labor's main concern with the proposed sale (*i.e.*, the transfer of work opportunities), respondents center on the manner in which the C&NW's actions—*i.e.*, the abolishment of jobs—will affect employees once the sale is consummated, and assert that this case presents nothing more than a dispute over whether the C&NW has a "contractual justification" flowing from its reduction in force provisions to abolish jobs.[1] Such a question, they contend, is clearly for an adjustment board to resolve and, thus, this case does not present an issue of law which warrants review by this Court. Respondents also add that to accept rail labor's view of the role which federal courts should play in rail

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[1] Respondents' assertion that this case is unique because it involves the C&NW's reduction in force agreements and past practice, and thus, may not be applicable to other carriers (Resp. Brief at 25), is misleading, for reduction in force provisions are standard in the rail industry. Indeed, they are standard labor agreement provisions, for 91% of the contracts in manufacturing and non-manufacturing surveyed by the Bureau of National Affairs for its 1986 publication BASIC PATTERNS IN UNION CONTRACTS contained reduction in force provisions. More pertinent to this case, however, is the fact that the reduction in force provisions in the railroad industry are primarily the products of "national agreements" between most Class I rail carriers and the non-operating craft unions. For example, the C&NW's predecessor and most carriers in this nation entered into an agreement with eleven unions in 1962 to include a five day notice period in the reduction in force provisions. Agreement of June 5, 1962 (included in agreement files of the National Mediation Board).

labor disputes arising from line sales "would impose an intolerable burden on the federal courts, by substituting concurrent federal court jurisdiction for the adjustment boards' exclusive jurisdiction over thousands of minor disputes that arise each year." Resp. Brief at 19. Petitioners respectfully submit that those arguments are without merit and, indeed, the mere fact that respondents can make them shows the urgent need for this Court to clarify the proper role of federal courts in rail labor disputes where a railroad, in defending against a claim that it has ignored the major dispute resolution processes of the Railway Labor Act, raises no more than an arguable contractual justification to support a clear change in existing working conditions without any showing that the particular change was the subject of prior negotiations. *See, Detroit & Toledo, supra,* 396 U.S. at 160 (Harlan, J., concurring and dissenting).

Contrary to respondents' dire predictions, rail labor is not seeking to have federal courts exercise jurisdiction over "minor" disputes, for Congress has given adjustment boards under Section 3 of the Railway Labor Act exclusive jurisdiction to resolve disputes arising out of the interpretation or application of collective bargaining agreements in disputes involving the enforcement of individual contractual rights—*i.e.*, "minor disputes." *E.g., Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 325 (1972). Rather, petitioners, by their claim that the C&NW is required to give notice, are attempting to enforce the command of Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh, that no change may be made in "rates of pay, rules or working conditions, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act." Disputes over such changes are classified as major, and are not to be resolved by compulsory arbitration. *E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 384 (1969). This case, peti-

tioners submit, shows that an expansive view of minor disputes can nullify the commands encompassed in Section 2 Seventh.

Respondents' response presents very vividly the problem which the rail industry is facing today in attempting to distinguish between the two classes of disputes by using the myopic classification standard applied by the courts below.[2] Here, the C&NW's claim that it had a contractual justification to take an action—*i.e.*, to abolish jobs—which results from the change—*i.e.*, the transfer of work opportunities to FRVR—has resulted in the courts classifying a clear change in working conditions as being a minor dispute which must be arbitrated. That conclusion is clearly an aberration of Congress' intent in enacting Section 3 of the Railway Labor Act in 1934, for while it is beyond question that Congress intended to give the adjustment boards exclusive jurisdiction over minor disputes, it is also clear that Congress, when it passed those amendments in 1934, did not intend to enact a form of compulsory arbitration of disputes over *changes* in existing working conditions. Indeed, as Commissioner Joseph B. Eastman explained in proposing what became Section 3 of the Act: "Please note that *disputes concerning changes* in rates of pay, rules, or working conditions may not be so referred [to adjustment boards], but are to be handled, when unadjusted, through the process of mediation." *Hearings on S. 3266, Before Senate Committee on Interstate Commerce*, 73rd Cong., 2d Sess. at 17

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[2] Respondents assert that rail labor never challenged this classification standard below, and thus should not be allowed to raise that issue before this Court. Resp. Brief at 14. That assertion is incorrect, for petitioners have consistently argued that it is improper to apply the classification standard to a status quo issue, and that it is impossible to classify a dispute over changes in existing working conditions as being a minor dispute, even if the carrier raises an arguable contract justification argument in defense of rail labor's suit seeking to enforce Section 2 Seventh of the Act. Transcript of oral argument before the District Court on March 14, 1988 at 82.

(1934) (testimony of Commissioner Eastman) (emphasis added).

Respondents' reliance on its reduction in force provisions cannot alter the fact that this case clearly involves a change in the working conditions of employees as embodied in agreements. At present, C&NW employees have seniority rights to perform the work which is currently being performed on or in connection with the Duck Creek South lines, but once the sale occurs, those seniority rights will no longer entitle C&NW employees to perform that work. This is so because the C&NW, by the sale, will have transferred to FRVR the job opportunities currently embodied within the C&NW employees' seniority rights. There are, however, no agreements which specifically cover this change in seniority rights, and, thus, what the Third Circuit said in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420, 428 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217 (emphasis in original), is equally applicable here: The carrier "has proposed action which might not *violate* its agreements, yet it plainly would *change* the nature of those agreements."

When this dispute is viewed realistically, it is clear that this dispute involves a change in existing working conditions, and, thus, must be handled under the Railway Labor Act's notice, negotiation and mediation provisions. Indeed, this is the way three appellate courts have concluded that similar transfers of work opportunities must be viewed. *Burlington Northern R.R. v. UTU*, 848 F.2d 856, 864 n.9 (8th Cir. 1988), *pet. for cert. pending*, No. 88-711;[3] *RLEA v. Pittsburgh & Lake Erie R.R.*,

[3] Respondents contend that the Eighth Circuit's decision is inapposite because the carrier's force-reduction agreements were not before the court. That argument is incorrect, for the court stated that an "alternative holding" for its decision that an injunction should not issue, was that the carrier "itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission." 848 F.2d at

supra, 845 F.2d at 428; *United Industrial Workers v. Board of Trustees*, 351 F.2d 183, 189-90 (5th Cir. 1965). The fact that respondent C&NW could transform the entire nature of this dispute, involving a clear change of working conditions into one that is subject to resolution by an adjustment board, simply by relying upon a claim that it has a right to abolish jobs once the work is actually transferred, shows that the lower courts and the rail industry need guidance from this Court as to the proper manner in which disputes involving changes in existing agreements will be classified.

Respectfully submitted,

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864 n.9. In making that alternative holding, the court rejected the Burlington Northern's reliance on past practice involving the transfer of 2,700 miles of track and the abandonment of over 7,600 miles of line without bargaining, and the carrier's argument that:

> Under its existing agreements and past practices thereunder, [Burlington Northern] . . . has the unilateral right to abolish jobs resulting from the scaling back of its opertaions, subject only to proper notice to affected employees and certain other collective bargaining agreement requirements with which it complies.

(BN Supplemental Brief dated December 29, 1987 in 8th Cir. Nos. 88-2600 and 87-2581 at 7).